UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 13

Moore Landscapes, Inc.)
Employer/Charging Party,))
and))
International Union of Operating Engineers, Local 150, AFL-CIO,)))
Respondent,))
and) Case Nos. 13-CD-800; 13-CD-801
International Brotherhood of Teamsters, Local 703,)))
Respondent,))
and)
United Union of Roofers, Water-Proofers, And Allied Workers, Local No. 11,)))
Party-In-Interest,)
and)
Laborers International Union, Local 4)
Party-In-Interest.))

POST-HEARING BRIEF OF IUOE, LOCAL 150 AND IBT, LOCAL 703

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TABLE OF CONTENTS

TAB	LE OF AUTHO	ORITIES	iii
STA	TEMENT OF T	HE CASE	1
STA	TEMENT OF F	ACTS	1
DISF	PUTED WORK		3
ARG	GUMENT		4
I.		as Jurisdiction To Make A Determination Of This Dispute Pursuant 0(k).	4
	A.	There Are Competing Claims For Work Being Performed By Moore At The Roosevelt Collection Project	5
	В.	There Is Reasonable Cause To Believe That Section 8(b)(4)(D) Has Been Violated.	6
	C.	All Parties Have Not Agreed On An Alternative Method To Resolve This Dispute.	8
II.	The Board Sh	nould Award The Disputed Work To Local 150 and Local 703	11
	A.	Employer Preference And Past Practice Favor An Award to Local 150 and Local 703	12
	В.	Certifications And Collective Bargaining Agreements Favor An Award To Local 150 and Local 703.	14
	C.	Area And Industry Practice Favor An Award to Local 150 and Local 703.	16
	D.	Economy and Efficiency Favors An Award to Local 150 and Local 703	17
	E.	Skills, Safety and Training Favor An Award to Local 150 and Local 703. Training Favors Local 150	19
	F.	The Likelihood Of Job Loss Favors An Award To Local 150 and Local 703.	21
CON	ICLUSION		22

TABLE OF AUTHORITIES

Cases

Bricklayers (Cretex Construction Services), 343 NLRB 1030 (2004)	8
Construction & General Laborers' District Council of Chicago and Vicinity (Henkels &	
McCoy), 336 NLRB No. 108 (2001)	19
Construction and General Laborers District Council of Chicago and Vicinity, Local 1006	
(Central Blacktop), 292 NLRB 57 (1988)	3, 11, 18
Electric Machinery Co., 194 NLRB 898 (1972)	
Electrical Workers Local 222 (KTVU), 272 NLRB 648 (1984)	17
Garg v. Potter, 521 F.3d 731 (7th Cir. 2008)	7, 13
IBEW, Local 103 (Lucent Technologies), 333 NLRB 828 (2001)	
International Longshoremen's Associations (Coastal Cargo), 323 NLRB 570 (1997)	14
International Union of Elevator Constructors, Local 2 (Kone, Inc.), 349 NLRB 1207	
(2007)	8
International Union of Elevator Constructors, Local 91 (Otis Elevator Co.), 340 NLRB	
94 (2003)	
Iron Workers Local 40 (Unique Rigging), 317 NLRB 231 (1995)	21
Iron Workers Local 6 (Kulama Erectors), 264 NLRB 166 (1982)	17
<u>Ironworkers Local 380 (Stobeck Masonry, Inc.)</u> , 267 NLRB 184 (1983)	, 12, 16
<u>IUOE, Local 150 (All American)</u> , 296 NLRB 933 (1989)	12
<u>Laborers Int'l Union of North America (Anderson Interiors, Inc.)</u> , 353 NLRB No. 62	
(2008)	9
Laborers Int'l Union of North America (E&B Paving, Inc.), 340 NLRB 1256 (2003)	7
Laborers Local 1030 (Exxon Chemical), 308 NLRB 706 (1992)	
Laborers' District Council (Anjo Construction), 265 NLRB 186 (1982)	17
Laborers' Int'l Union of North America, Local 113 (Super Excavators, Inc.), 327 NLRB	
113 (1998)	5
Lancaster Typographical Union No. 70 (C.J.S. Lancaster), 325 NLRB 449 (1998)	7
Local 3, IBEW (Alliance Elevator Co.), 352 NLRB 1947 (2008)	6, 8
Local 7, Empire State Regional Council of Carpenters (UBC and Five Brother, Inc.), 344	
NLRB 910 (2005)	
Machinists District 118 (Meredith Printing), 243 NLRB 892 (1979)	
Machinists Lodge 776 (Lockheed Martin), 352 NLRB 402 (2008)	
Machinists, Lodge 837 (McDonnell Douglass Corp.), 242 NLRB 913 (1979)	12
Newark Typographical Union (Mid-Atlantic Newspapers), 220 NLRB 4 (1975)	
NLRB v. Radio and Television Broadcasters, 364 U.S. 573 (1961)	
Operating Engineers Local 158 (E.C. Ernst), 172 NLRB 1667 (1968)	16
Robbins Plumbing & Heating Contractors, Inc., 261 NLRB 482 (1982)	
Teamsters Local 79 (Electric Machinery Co.), 194 NLRB 898 (1972)	16
United Association, Local 447 (Rudolph & Sletten, Inc.), 350 NLRB 276 (2007)	13, 14
Statutes	
29 U.S.C. § 152(2)	1
29 U.S.C. § 158(b)(4)(D)	
, , , , , ,	

STATEMENT OF THE CASE

On or about June 25, 2009, Moore Landscapes, Inc. ("Moore," the "Employer" or the "Company"), filed unfair labor practice charges with the National Labor Relations Board, Region 13, alleging that the International Union of Operating Engineers, Local 150, AFL-CIO ("Local 150") and the International Brotherhood of Teamsters, Local 703 ("Local 703") violated Section 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D), of the National Labor Relations Act (the "Act"). The Regional Director found merit to the charges. On or about July 2, 2009, Region 13 issued a Notice of Hearing.

On July 14, 15 and 16, 2009, Region 13 conducted a hearing pursuant to Section 10(k) of the Act, 29 U.S.C. § 160(k). Post-hearing briefs were originally scheduled to be due on July 23, 2009. On July 20, 2009, the parties filed a Joint Request for Extension of Time to File Post-Hearing Briefs. On July 21, 2009, the Board granted the Motion and extended the submission date to August 24, 2009. Local 150 and Local 703 now file their brief in support of its position that the Board should award the disputed work to Local 150 and Local 703.

STATEMENT OF FACTS

Local 150 and Local 703 are labor organizations as that term is defined in Section 2(5) of the Act, 29 U.S.C. § 152(2) (Stipulation ¶¶ 3, 4). Local 150 and Local 703 jointly represent employees working in the landscape industry throughout northern Illinois (Tr. 272; Employer Ex. 2; 150/703 Ex. 1). Local 150 and Local 703 are signatory to one hundred and ten (110) joint collective bargaining agreements with landscape contractors (id.).

Moore is a commercial landscape contractor and has been in business since 1948 (Tr. 19). Moore is also a statutory employer and is bound to the terms of a joint collective bargaining

agreement with Local 150 and Local 703 covering its non-equipment operator¹ landscape employees (Tr. 22). At no time has Moore been signatory to a collective bargaining agreement with the United Union of Roofers, Water-proofers and Allied Workers, Local No. 11 ("Roofers' Union") or with Laborers International Union, Local 4 ("Laborers' Union") (Tr. 41, 480).

Moore is currently working on a landscape construction project at 949 South Wells Street in Chicago, Illinois. This project, commonly known as the Roosevelt Collection project, is a mixed-use development--consisting of condominiums, apartments, retail shops, a theatre and parking (Tr. 42-43). Walsh Construction Company ("Walsh") is the general contractor on the project (Tr. 43). Walsh subcontracted the landscape work on the project to Moore; the value of the subcontract exceeds \$1.5 million (Tr. 46). The scope of work in Moore's subcontract contains 38 subparts and includes, among other things, the following work: installation of a green grid roofing system inside the plaza, the roof of the theatre complex and on the roofs of the east and west loft buildings; planting of trees, plants and annual flowers; and installing planters, retaining walls and precast modular blocks (Tr. 46-49).

As it relates to this case, the subcontract calls for the installation of both "green grid" systems and "built-up" systems. A "green grid" system consists of a series plastic trays that are pre-planted off-site and then placed in a pre-determined "grid" pattern at the job site (Tr. 72, 136). The plastic trays measure four feet by two feet (4x2) (Tr. 136). A built-up system, on the other hand, requires the contractor to place a series of thin layers of insulation and drainage sheets atop a roof membrane, followed by the growth media (i.e. specially engineered "soil") and then the final plant material. A diagram of the green roof system (also known as built-up system) being used in this case appears on page eight of Employer's Exhibit 15. On the diagram,

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¹ Moore's equipment operator employees are covered by a separate collective bargaining agreement between Moore and Local 150 (Tr. 22).

layer 9 is the actual roof and layer 1 is the final growing plant material. The Walsh subcontract requires Moore to install 58,000 square feet of green grid landscaping and 24,000 square feet of built-up roof-top landscaping (Tr. 141).

Moore began work on the Roosevelt Collection project on or about April 6, 2009 (Tr. 52). Moore assigned all the landscape construction work covered by the subcontract to members of Local 150 and Local 703 (Tr. 50, 51). After Moore commenced work on the project, the Roofers' Union and the Laborers' Union made competing claims for the roof-top construction work being performed by Moore at the Roosevelt Collection project (Tr. 57-60). On June 23, 2009, Local 150 and Local 703 threatened to picket Moore if it reassigned any of the disputed work to members of the Roofers' Union or Laborers' Union (Tr. 63, Employer Ex. 12). Notwithstanding the competing claims and corresponding threats to picket, it remains Moore's preference to continue using members of Local 150 and Local 703 to perform the disputed work at the Roosevelt Collection project (Tr. 52, 116, 146-7).

DISPUTED WORK

In the Notice of Hearing, Region 13 originally defined the disputed work as including the following tasks: "the green grid and green roof system, general planting and retaining wall work at the jobsite located at 949 South Wells, [Chicago], Illinois, also known as the Roosevelt Collection Project." The original description of the disputed work has been modified, based on the positions taken by the parties subsequent to the issuance of the Notice of Hearing.

With respect to the installation of the green grid system, the Roofers' Union only claims the placement of the trays (Tr. 153). For their part, Local 150 and Local 703 claim the entire installation and maintenance of the green grid system, including the placement of trays (Tr. 294-96, 300-01). Thus, the disputed work as it relates to the green grid system is limited to the placement of the trays.

With respect to the so-called built-up system, the Roofers' Union claims everything from the roof (layer 9) up to the partial placement of the growing media, i.e. soil (layer 2) (Tr. 153). Local 150 and Local 703 claim the installation of everything above the membrane (beginning with layer 7) through the installation of the final plant material (layer 1) (Tr. 293-294; 300-01). Based on the framing of the issue, the disputed work on the built-up system includes the installation of all the layers above the membrane (layer 7), through the placement (but not spreading) of the growing media (layer 2).

Prior to the commencement of the hearing, the Laborers' Union disclaimed interest in any of the work described in the Notice of Hearing. At the hearing, the Roofers' Union disclaimed interest in the watering or maintenance of the plant material (Tr. 153-55) and the installation of retaining walls (Tr. 151-52); pavers (Tr. 155-56); benches, trash receptacles (Tr. 157); bike racks; stoneware planters; or trellises (Tr. 158). Based on these disclaimers, "general planting and retaining wall work" are no longer at issue. The disputed work now consists of the placement of the trays related to the installation of the green grid system *and* the installation of the layers above the membrane through the placement of the growing media on the built-up system.

ARGUMENT

I. The Board Has Jurisdiction To Make A Determination Of This Dispute Pursuant To Section 10(k).

The Board must proceed with a determination of the dispute pursuant to Section 10(k) of the Act if: (1) there are competing claims for the work in question; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and, (3) the parties have not agreed on a method for the voluntary adjustment of the dispute. Laborers' Int'l Union of North America,

<u>Local 113 (Super Excavators, Inc.)</u>, 327 NLRB 113, 114 (1998). All of the elements are satisfied in this case.

A. There Are Competing Claims For Work Being Performed By Moore At The Roosevelt Collection Project.

A jurisdictional dispute "is a dispute between two or more groups of employees over which are entitled to do certain work for an employer." NLRB v. Radio and Television Broadcasters, 364 U.S. 573, 579 (1961). On April 6, 2009, Moore commenced work on the Roosevelt Collection project and assigned the roof-top landscape construction work on that project to members of Local 150 and Local 703 (Tr. 52). Soon after, Eric Moore, President of Moore, received a copy of a letter dated April 8, 2009, from Arthur Lucas, Business Representative of the Roofers' Union, to the Joint Conference Board ("JCB") of the Chicago and Cook County Building and Construction Trades Council (Tr. 53, Employer Ex. 7). Lucas sent the letter in order to initiate proceedings before the JCB to resolve a jurisdictional dispute regarding the "green roofing" at the Roosevelt Collection project (id.). As will be discussed in further detail below, neither Moore nor Local 703 are now or have ever been bound to the JCB's procedures. Nonetheless, the Roofers' Union continued to advance its jurisdictional claims through the JCB procedures and even obtained a favorable (albeit unenforceable) arbitration award. In any event, the Roofers' Union claim for the disputed work in the JCB proceedings amounts to a "competing claim" sufficient to trigger Section 10(k) of the Act.

For their part, Local 150 and Local 703 made a competing claim for the work in the joint letter dated June 23, 2009, to Eric Moore (Employer Ex. 12). In their letter to Moore, Jim McNally, Vice President of Local 150, and Tom Stiede, Secretary-Treasurer of Local 703 responded to the claims made by the Roofers' Union and Laborers' Union for the roof-top construction work at the Roosevelt Collection project by claiming the same work on behalf of

Local 150 and Local 703 (id.). Although the Laborers' Union later disclaimed interest in the disputed work, the Roofers' Union and Local 150/Local 703 continued to assert competing claims for the disputed work throughout the hearing. There are plainly competing claims in this case.

B. There Is Reasonable Cause To Believe That Section 8(b)(4)(D) Has Been Violated.

A threat to engage in conduct proscribed by Section 8(b)(4)(D) constitutes a violation of the statute. Robbins Plumbing & Heating Contractors, Inc., 261 NLRB 482, 487 (1982). "In a Section 10(k) proceeding, the Board is not charged with finding that a violation did, in fact occur, but only that reasonable cause exists for finding such a violation." Local 7, Empire State Regional Council of Carpenters (UBC and Five Brother, Inc.), 344 NLRB 910, 911 (2005). Thus, in order to proceed to the merits in this case, the Board need only find reasonable cause to believe that Local 150 and Local 703 threatened to engage in activity proscribed by Section 8(b)(4)(D).

"It is well established that as long as a Union's statement, on its face, constitutes a threat to take proscribed action, the Board will find reasonable cause to believe the statute has been violated, in the absence of affirmative evidence that the threat was a sham or the product of collusion." Local 3, IBEW (Alliance Elevator Co.), 352 NLRB 1947 (2008). In June 2009, officials from Local 150 and Local 703 learned that the Roofers' Union and the Laborers' Union had made claims for work being performed by Moore at the Roosevelt Collection project (Tr. 277-8). In response, on June 23, 2009, McNally and Stiede sent a joint letter to Moore wherein they threatened to picket Moore if Moore reassigned any work to members of the Roofers' Union or Laborers' Union (Er. Ex. 12, Tr. 278, 300). Under Alliance Elevator, the June

23rd letter from McNally and Stiede is sufficient to establish reasonable cause to believe that Section 8(b)(4)(D) was violated.

Without articulating any factual basis for the position, counsel for the Roofers' Union asserted at the hearing that there is no reasonable cause to believe that Section 8(b)(4)(D) was violated (Tr. 16). As explained above, the June 23rd letter is sufficient, on its face, to trigger the statute. By failing to articulate any alternative basis for its legal conclusion, the Roofers' Union waived its right to advance any alternative arguments in its post-hearing brief. Garg v. Potter, 521 F.3d 731, 736 (7th Cir. 2008) (undeveloped arguments are waived). Moreover, the Roofers' Union failed to present any affirmative evidence that the threat letter was a sham or the product of collusion. Cf., Laborers Int'l Union of North America (E&B Paving, Inc.), 340 NLRB 1256, 1258 n. 4 (2003) quoting Lancaster Typographical Union No. 70 (C.J.S. Lancaster), 325 NLRB 449, 451 (1998) (the Board will not find reasonable cause to believe that Section 8(b)(4)(D) has been violated upon a showing that the "threat was a sham or the product of collusion").

At the hearing, both McNally and Stiede testified that they intended to picket if Moore reassigned any of the disputed work to either of the rival unions (Tr. 278, 302). As Stiede explained, "I don't think anything could be more offensive than having our work subcontracted out to someone else..." (Tr. 302). Eric Moore testified that he panicked when he received the letter (Tr. 64). Eric Moore explained that the Company was "paralyzed" by the competing claims and the strike threat (id.); see also Radio and Television Broadcasters, 364 U.S. at 580 (Congress enacted Sections 8(b)(4)(D) and 10(k) of the Act "to protect employers from being 'the helpless victims of quarrels that do not concern them at all'"). The Roofers' Union presented no evidence to undercut this testimony about the legitimacy of the threat and/or the reaction from the Employer. Of course, even if there were conflicting testimony, under the

"reasonable cause" standard, the Board need not resolve such conflicts in order to proceed to the merits. Construction and General Laborers District Council of Chicago and Vicinity, Local 1006 (Central Blacktop), 292 NLRB 57 (1988).

Finally, the Roofers' Union elicited testimony to suggest that there is a no-strike clause in the collective bargaining agreement between Moore and Local 150 and Local 703. Notably, the "Board has rejected the argument that a strike threat was a sham simply because it would have violated a no-strike clause." Alliance Elevator, 352 NLRB 1947, citing Bricklayers (Cretex Construction Services), 343 NLRB 1030, 1032 fn. 5 (2004). On this record, there is reasonable cause to believe that Section 8(b)(4)(D) was violated.

C. All Parties Have Not Agreed On An Alternative Method To Resolve This Dispute.

"In order for an agreement to constitute an agreed-upon method for the voluntary adjustment, all parties to the dispute must be bound to that agreement." International Union of Elevator Constructors, Local 2 (Kone, Inc.), 349 NLRB 1207, 1210 (2007). At the outset of the hearing, the Roofers' Union argued that there was, in fact, an agreed upon method for the voluntary adjustment which culminated in the arbitration decision by Arbitrator [Bierig] . . ." (Tr. 17). In this case, the Roofers' Union initiated jurisdictional proceedings against Local 150 and Local 703 with the JCB regarding the work being performed at the Roosevelt Collection Project. Those proceedings culminated in the issue of an arbitration award from Steven M. Bierig. The Roofers' Union is apparently taking the position that all parties to this dispute (Moore, Local 150 and Local 703) were bound to the procedures established by the JCB. For the reasons explained below, neither Moore nor Local 703 agreed to submit any disputes to the JCB for resolution. Therefore, neither the JCB proceedings nor the resulting arbitration award should prevent the Board from proceeding to the merits of this dispute.

"In order to determine if the parties are bound [to an alternative procedure], the Board carefully scrutinizes the agreements at issue." Laborers Int'l Union of North America (Anderson Interiors, Inc.), 353 NLRB No. 62 (2008), slip op. at 10. The proceedings of the JCB are governed by the Joint Conference Board Standard Agreement ("Standard Agreement") (Tr. 276, 150/703 Ex. 3). The Standard Agreement is an agreement between the Construction Employer's Association and the Chicago & Cook County Building & Construction Trades Council. A *union* is bound to the Standard Agreement only if it is an affiliate of the Chicago and Cook County Building and Construction Trades Council (150/703 Ex. 2, Article VII). In this case, Local 703 is not a member of, or otherwise affiliated with, the Chicago and Cook County Building Trades (Tr. 275, 298). For its part, neither Moore nor the Illinois Landscape Contractors Bargaining Association² ("ILCBA") is a member of the Construction Employer's Association (Tr. 522). Thus, neither Moore nor Local 703 are parties to the Standard Agreement.

There are only two other ways in which an *employer* can become bound to the Standard Agreement. First, the Standard Agreement provides that an *employer* may be bound to the Standard Agreement if it is signatory to a collective bargaining agreement containing language that adopts or incorporates the Standard Agreement (see 150/703 Ex. 3, Article VII, p. 5; see also Article VIII, Paragraph 4 "Any Association that incorporates Joint Conference Board stipulation language into their collection bargaining agreement will automatically have representation on the Joint Conference Board"). In this case, there is *no* language in the parties' collective bargaining agreement that adopts or incorporates the Standard Agreement or any other JCB procedures for purposes of resolving jurisdictional disputes (Tr. 61-2, 298; *cf.* Employer Ex. 4). Moreover, Moore has never agreed to follow or be bound by the JCB's Standard Agreement (Tr. 62), nor

The Illinois Landscape Contractors Bargaining Association ("ILCBA") is a multi-employer bargaining association to which Moore belongs (Tr. 23).

did it ever stipulate to the terms of the Standard Agreement. And, at no time did Moore ever agree to follow or be bound by any decisions rendered by a JCB arbitrator relative to this dispute concerning the Roosevelt Collection project (Tr. 62). Thus, Moore was not bound to the Standard Agreement through its collective bargaining agreement or through any other agreement or stipulation.

Second, Article VII, Paragraph 10 provides, "[a]ny interested party present at the hearing, whether making a presentation or not, by such presence shall be deemed to accept the jurisdiction of the arbitrator and to agree to be bound by its decision and further agrees to be bound by the Standard Agreement, for that case only if not otherwise so bound" (150/703 Ex. 3). On June 5, 2009, an arbitration hearing was convened in response to a grievance filed by the Roofers' Union with the JCB regarding the work being performed by Moore at the Roosevelt Collection project (Tr. 304, 440-41, Roofer's Ex. 2). At the Section 10(k) hearing, Arthur Lucas, conceded that no representatives from Moore or Local 703 attended the June 5th arbitration hearing (Tr. 441; see also Tr. 304). In fact, Tom Stiede, Secretary-Treasurer of Local 703, testified at the Section 10(k) hearing that he was not even aware of the June 5th arbitration hearing (Tr. 304). Therefore, based on their absence from the hearing, neither Moore nor Local 703 can be deemed to have accepted the jurisdiction of the arbitrator pursuant to Article VII, Paragraph 10 of the Standard Agreement. On this record, there is simply no basis to conclude that Moore Landscapes or Teamsters Local 703 was bound to the Standard Agreement and/or Arbitrator Bierig's decision.

The Roofers' Union suggests, however, that all parties are bound to the JCB's procedures by virtue of their attendance at a meeting convened in early May 2009 (Tr. 441-2). The Roofers' Union is wrong for several reasons. First, Article VII, Paragraph 10 of the Standard Agreement

provides that a party accepts the jurisdiction of the arbitrator if it is present at the *hearing* (150/703 Ex. 3). In this case, the record is clear that no one from Moore or Teamsters, Local 703 attended the June 5th *hearing*. There is nothing in the Standard Agreement to suggest that a party consents to the jurisdiction of an arbitrator by merely attending a meeting. Second, the grievance that triggered the June 5th arbitration hearing had yet to be filed when the parties met in early May to discuss the matter. The grievance on file at the time of the meeting in early May never advanced to arbitration (Tr. 440). In addition, the grievance giving rise to the June 5th arbitration hearing was not filed until late May 2009 (Tr. 442). There is no basis to conclude that Moore or Local 703 consented to the jurisdiction of the arbitrator by attending a meeting three weeks before the Roofers' Union even filed the grievance that gave rise to the June 5th arbitration hearing. All parties to this dispute have not all agreed upon an alternative method to resolve this dispute. Since all three threshold requirements are satisfied in this case, the Board should proceed to the merits and make an award of the disputed work to Local 150 and Local 703.

II. The Board Should Award The Disputed Work To Local 150 and Local 703.

Section 10(k) requires the Board to make an affirmative award of disputed work after giving due consideration to various factors. <u>Ironworkers Local 380 (Stobeck Masonry, Inc.)</u>, 267 NLRB 184 (1983). The Board's determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. <u>Construction and General Laborers District Council of Chicago and Vicinity, Local 1006</u> (Central Blacktop Co., Inc.), 292 NLRB 57 (1988).

A. Employer Preference And Past Practice Favor An Award to Local 150 and Local 703.

The Board normally accords employer preference considerable weight. Stobeck Masonry, Inc., 267 NLRB at 287, fn. 8. Accordingly, the Board will make an award to the union-represented employees to whom the employer prefers to assign, and has in the past assigned, the disputed work. Machinists Lodge 776 (Lockheed Martin), 352 NLRB 402 (2008); see also IUOE, Local 150 (All American), 296 NLRB 933, 936 (1989); Machinists, Lodge 837 (McDonnell Douglass Corp.), 242 NLRB 913 (1979). In discerning "employer preference" in a Section 10(k) analysis, the Board relies on the general contractor's as well as the subcontractor's preference. Laborers Local 1030 (Exxon Chemical), 308 NLRB 706, 708 (1992).

In this case, Moore has historically assigned roof-top landscape construction work, including the installation of green grid systems and built-up systems, to members of Local 150 and Local 703 (Tr. 202, *cf.* 191-202 and Employer Ex. 17). More importantly, it is Moore's preference to complete the disputed work at the Roosevelt Collection project using members of Local 150 and Local 703 (Tr. 52, 116, 146-7). Thus, the "employer preference" factor favors an award of the disputed work to members of Local 150 and Local 703.

An award of the work in favor of Local 150 and Local 703 is also consistent with the preferences of the general contractor on the project, Walsh (Tr. 46). Walsh specifically took the "green roof" portion of the project out of scope of work in the subcontract it awarded to the roofing contract, A1 Roofing (Tr. 470). Walsh included the "green roof" work in the \$1.5 million landscape contract it eventually awarded to Moore (Tr. 46, 471). The landscape subcontract contains 38 parts (Tr. 471). Arthur Lucas conceded at the hearing that members of the Roofers' Union do not perform most of the work described in the landscape subcontract

(Tr. 472-475). Lucas testified that he would have preferred if the general contractor, Walsh, had broken up the 38-part landscape subcontract at issue in this case into separate subcontracts and bid those separate subcontracts out to various contractors (Tr. 476). Now that Moore has the subcontract, Lucas testified that he would like Moore to subcontract the disputed work to a roofing contractor (Tr. 478).

Of course, Lucas' preferences are irrelevant in the Board's 10(k) analysis. The general contractor, Walsh, and the subcontractor, Moore, made their own independent business decisions that reflect their own preferences. The Board should affirm the general contractor's decision to include the disputed work in the landscape subcontract and Moore's managerial decision to self-perform the disputed work using members of Local 150 and Local 703. The clear preferences of the general contractor, Walsh, and the subcontractor, Moore, favor an award of the work to Local 150 and Local 703.

The Roofers' Union is attempting, however, to negate the Employer's preference by arguing that Moore does not have a roofing license from the State of Illinois (Tr. 139, 482). This argument is a non-starter for several reasons. First, the Roofers' Union did not articulate or develop this argument in their opening statement of position. Garg, 521 F.3d at 736 (undeveloped arguments are waived). In fact, the Roofers' Union did not even cite the provision of Illinois law (statutory or regulatory) that relates to licensure of roofing contractors. Second, and perhaps more importantly, "the Board does not rely on licensing requirements where 'the applicability of the regulation is unclear' and the Board would be required 'to make an interpretation of the regulation." United Association, Local 447 (Rudolph & Sletten, Inc.), 350 NLRB 276, 281 (2007). As explained above, the Roofers' Union failed to identify the provision of Illinois law at issue. Moreover, "the record does not contain a 'definitive interpretation' by

the State concerning the applicability of the state licensing requirements to the work in dispute." Id., citing IBEW, Local 103 (Lucent Technologies), 333 NLRB 828, 831 (2001). Thus, under Rudolph & Sletten, the absence of a state license does not trump "employer preference." This factor favors an award of the work to Local 150 and Local 703.

B. Certifications And Collective Bargaining Agreements Favor An Award To Local 150 and Local 703.

When one of the competing unions has a current agreement with the employer and the other does not, this factor favors an award to the employees covered by the agreement. International Longshoremen's Associations (Coastal Cargo), 323 NLRB 570, 572-3 (1997); see also International Union of Elevator Constructors, Local 91 (Otis Elevator Co.), 340 NLRB 94, 96 (2003) ("Although both Unions' collective bargaining agreements arguably cover the work in dispute, the collective bargaining agreement that is relevant is the one that has been negotiated with the employer who has the ultimate control over the assignment of the work").

This factor applies even when the collective bargaining agreement between the employer and the union only "arguably" covers the disputed work. For example, in <u>United Association</u>, <u>Local 447 (Rudolph & Sletten, Inc.)</u>, 350 NLRB 276, 279 (2007), the employer's collective bargaining agreement with the carpenters union contained general language arguably covering the work in dispute, employees employed under the agreement had performed similar work, the parties to the agreement considered the work in dispute to be covered by the agreement and the employer had no collective bargaining agreement with either of the rival unions: the plumbers and electricians. On those facts, the Board held that the "collective bargaining" factor favored an award of the work to employees represented by the carpenters. <u>Id.</u>

In this case, Local 150 and Local 703 were certified as the joint exclusive bargaining representatives of Moore's employees working in the following classifications: working

foremen, lead plantsmen, plantsmen, truck drivers, water truck operators, mechanics, landscape construction laborers, installers and helpers (Employer Ex. 3, Tr. 28-29, 32). The ILCBA (to which Moore belongs) is currently signatory to a joint collective bargaining agreement with Local 150 and Local 703 (Employer Ex. 2). The parties' joint collective bargaining agreement covers the landscape work in dispute in this case (See Employer Ex. 2 Article III and Article VI, Section 6). Specifically, Article III provides:

The scope of work covered by this Agreement shall include but not be limited to all work historically performed in the landscape construction industry at or on construction sites, including the installation and watering of plant materials,...construction of retaining walls and related gravel work,...brick paving,...the installation of playground equipment and other landscape structures,...miscellaneous clean up functions associated with all such work, the placing of soil and other landscape materials, applying finish landscape materials on subgrade prepared by others, and the transporting of materials and equipment necessary to perform such work.

Thus, the collective bargaining agreement specifically covers "applying finish landscape materials in subgrade prepared by others..." There is no limitation in the contract on the type of subgrade on which finish landscape materials may be applied. And, a roof-membrane is clearly a subgrade prepared by others. That the collective bargaining agreement does not specifically mention "roof-top" construction is immaterial since all parties to the contract understood roof-top landscape construction to be covered by the collective bargaining agreement (Tr. 40, 275, 300). As Eric Moore explained, "I was involved with [the ILCBA] negotiations, and historically we never thought we needed to spell out locations because the interpretation always has been historically that [the CBA] covers all landscape work no matter where we're doing it" (Tr. 91).

In contrast, Moore is not, and has never been, signatory to a collective bargaining agreement with the Roofers' Union or the Laborers' Union (Tr. 41, 480). Therefore, the collective bargaining agreement entered by the Roofers' Union (Roofers' Ex. 4) is irrelevant.

The "certifications and collective bargaining" factor favors an award of the work to Local 150 and Local 703.

C. Area And Industry Practice Favor An Award to Local 150 and Local 703.

Where a majority of employers in the relevant area assign the work to one of the competing groups, that group is favored, even if there are occasional deviations from that norm. Teamsters Local 79 (Electric Machinery Co.), 194 NLRB 898 (1972); Operating Engineers Local 158 (E.C. Ernst), 172 NLRB 1667 (1968). Importantly, the Board is reluctant to disturb an established area practice. Stobeck Masonry, Inc., 267 NLRB 284.

There are at least one hundred and ten (110) landscape contractors signatory to the joint collective bargaining agreement with Local 150 and Local 703, which covers roof-top landscape construction work (Tr. 272; Employer Ex. 2; 150/703 Ex. 1). At the hearing, the Employer introduced a binder that was several hundred pages in length containing pictures and information regarding roof-top construction projects performed throughout the Chicagoland area by landscape contractors using members of Local 150 and Local 703 (Tr. 95-97; Employer Ex. 16). Specifically, the binder contained information and pictures regarding 119 roof-top landscape construction projects performed by the following landscape contractors, all of whom employ members of Local 150 and Local 703: Church Landscape, Countryside, Damgaard, Hawthorn Landscape, Hayden Landscape, Kinsella Landscape, Landscape Concepts, Moore Landscapes, Inc., Pedersen Company, Robert Ebl, Siteworks Construction, Twin Oaks Landscaping, Walsh Landscape and Beary Landscape (Employer Ex. 16; Tr. 94-98, Employer Ex. 17). The 119 projects identified in the binder represent just under one million square feet of roof-top landscape construction projects performed by contractors using members of Local 150 and Local 703 (Employer Ex. 17). The Board must not disturb this clear industry practice. Stobeck Masonry, Inc., 267 NLRB 284.

The Roofers' Union offered testimony, through Arthur Lucas, regarding roof-top construction projects performed by various contractors in the Chicagoland area (Tr. 389-403; 410-14). Despite identifying various contractors and projects, Lucas did not provide any testimony regarding which group or groups of employees worked on the projects identified (id.). Lucas testified that 135 local contractors were signatory to the Roofers' standard collective bargaining agreement (Tr. 376; 388-89; Roofers' Ex. 4). Yet, Lucas conceded that not all 135 contractors performed the disputed work (Tr. 481). Even Michael Herlihy, Executive Vice President of Olsson Roofing Co., conceded that general contractors commonly solicit bids for green roof projects from roofing contractors and landscape contractors (Tr. 519). Herlihy further conceded that this practice has been in place for three or four years (id.). Based on the volume of work depicted in Employer's Ex. 16, it is clear that general contractors regularly award this disputed work to landscape contractors that employ members of Local 150 and Local 703. And, as explained above, even some occasional deviations from the normal area practice are not sufficient to warrant an assignment to the Roofers. Electric Machinery Co., 194 NLRB 898 (1972). The "area and industry practice" factor favors an award of the work to Local 150 and Local 703.

D. Economy and Efficiency Favors An Award to Local 150 and Local 703.

The Board favors assignments that promote the efficient and economical performance of the work. Electrical Workers Local 222 (KTVU), 272 NLRB 648 (1984). In assessing economy and efficiency, the Board considers various factors including fragmentation of the work process and the potential for idle time and delay. Iron Workers Local 6 (Kulama Erectors), 264 NLRB 166 (1982); Laborers' District Council (Anjo Construction), 265 NLRB 186 (1982). Along these lines, the Board favors awarding work to the group of employees who are "already on site and available to perform other work for the employer in addition to the disputed work . . ." Local 7,

Empire State Regional Council of Carpenters (UBC and Five Brother, Inc.), 344 NLRB 910, 914 (2005). That is, efficiency is promoted when disputed work is assigned to employees who are performing other aspects of the project—particularly when the disputed work is incidental to other work being performed on the project. Construction & General Laborers' District Council of Chicago and Vicinity (Henkels & McCoy), 336 NLRB No. 108, slip opinion at 2 (2001); Machinists District 118 (Meredith Printing), 243 NLRB 892 (1979).

There at least 38 discrete tasks subsumed within the scope of work in Moore's subcontract with Walsh for the Roosevelt Collection project (Tr. 471, Employer Ex. 6, page 9-10). The Roofers' Union does not claim much of the work described in the subcontract (Tr. 151-57). In contrast, Moore's employees represented by Local 150 and Local 703 are cross-trained on the different landscape functions (Tr. 188) and can therefore perform *all* the work described in the subcontract (Tr. 116). For example, members of Local 150 and Local 703 can install the green grid, the retaining walls, site furnishings, grasscrete pavers and planters; they can also do the planting, the watering and the maintenance (Tr. 116-17). The ability of members of Local 150 and Local 703 to perform *all* aspects of Roosevelt Collection project gives Moore the ability to reduce, if not eliminate, idle time. This is because if one aspect of the project is delayed for some reason, Moore "can move guys around onsite as needed" to keep production running (Tr. 117).

Walsh hired Moore to install "green" spaces atop and around the Roosevelt Collection project, as depicted on the drawings marked as Employer Ex. 20. The placement of trays on the green grid system and the installation of the various layers on the built-up system is incidental to the broader roof top construction project. With respect to the "built-up" system, once the various layers are placed on the roof, the soil needs to be spread at a continuous level depth (Tr. 191).

This is necessary for drainage purposes, as much as aesthetics (<u>id.</u>). After the soil is spread and graded appropriately, the plant material is planted. As Lee Keenan, Executive Vice President of Countryside Industries, explained, maintenance of the plant material is the most vital component of a landscape rooftop construction project (Tr. 225). The maintenance portion of a project (either green grid or built-up) begins the second the plant material is planted (Tr. 226). That is, maintenance, in the form of watering, pest control and weeding, begins on day one (Tr. 227). Notably, the Roofers' Union is not claiming spreading planting, maintenance or watering (Tr. 151, 153, 155). Based on the nature of the project, the placement of the trays and the installation of the layers of the built-up system is incidental to the broader project. An award of the work to Local 150 and Local 703 promoted efficiency since those employees can perform all aspects of the landscape construction project at the Roosevelt Collection project.

E. Skills, Safety and Training Favor An Award to Local 150 and Local 703. Training Favors Local 150.

Formal training is preferable to on-the-job training. Award of work goes to the union with more formal training. Construction & General Laborers' District Council of Chicago and Vicinity (Henkels & McCoy), 336 NLRB No. 108, slip opinion at 2 (2001). In this case, Moore employees receive a mix of on-the-job training and formal training (Tr. 105). For example, the collective bargaining agreement between Local 150 and Local 703 contains strong incentives for employees to receive formal training. Under the contract, employees who complete a certification program and pass a test administered by the Illinois Landscape Contractors Association ("ILCA")³ earn the title "certified landscape technician" and receive increased compensation (Tr. 108-09). The test consists of a written portion and a hands-on portion (Tr. 109). The test covers grading and drainage, planting, plant sensitivity, plant identification,

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³ ILCA is a trade association that is independent from the multi-employer bargaining association, ILCBA (Tr. 109).

safety and plant maintenance (<u>id.</u>). In addition to administering the test, ILCA also puts on training for landscape employees (Tr. 110). Moore also requires its foreman and site supervisors to attend the 10-hour and 20-hour OSHA programs (Tr. 140).

Moore provides formal in-house training for its employees, as well. For example, in February 2009, Hydrotech (a manufacturer of green roof systems) provided training to several of Moore's employees (Tr. 111). The training included instruction on proper installation methods of the Hydrotech system (id.). Finally, on March 16, 2009, the ILCA and Local 150 cosponsored a training program on roof-top landscape construction work (Tr. 113). Several Moore employees attended the training (Tr. 114). The course provided instruction on fall protection, cranes, rigging and a variety of OSHA compliance issues for roof-top work (id.). The Roofers' Union provided evidence of their training program. Yet, Arthur Lucas testified that the Roofers' Union apprentice program did not teach the maintenance of the plant material (Tr. 475).

As explained above, the disputed work is incidental to the landscape construction work being performed at the Roosevelt Collection project. The expertise that the landscape contractor and its employees, in this case Moore and employees represented by Local 150 and 703, bring to a roof-top landscape construction project is the ability to keep the plant material alive. This is done principally through proper planting and maintenance techniques, including the ability to identify and replace sick or diseased plant material.

In contrast, the skills required to perform the *disputed* work are minimal, at best. With respect to the green grid system, Moore purchases pre-planted trays from another company (Tr. 137). The trays are plastic and measure four feet by two feet (Tr. 136). The trays are delivered to the jobsite by the supplier and hauled to the roof by the vendor (Tr. 137). Moore's employees then merely "place" the 4x2 plastic trays on the roof according to the plan (<u>id.</u>).

With respect to the built-up system, the Moore employees are required to spread out each layer, as depicted in Employer Ex. 15. In terms of the actual skills involved, the employees are required to operate a broom; they need to sweep to make sure each layer in clean before the next layer is installed (Tr. 515). Next, employees need to know how to operate a pair of scissors or a knife to cut the materials from the rolls on which they are delivered to the jobsite (<u>id.</u>). Employees then need to know how lay each layer flat on the roof (<u>id.</u>). And finally, employees need to know how to operate a hand cart to move the growth media (i.e. soil) and then drop the soil (typically still in bags) in place, as needed (<u>id.</u>).

The disputed work is plainly incidental to the broader roof-top landscape construction project. Arthur Lucas stated repeatedly that the disputed work was "Roofers" work. As evidenced by their extensive training program, members of the Roofers' Union possess an specialized skill set. None of those skills, however, are utilized in the installation of green grid systems or built-up systems. See Laborers' International Union of North America, Local 423, 183 NLRB 895, 899 (1970) (although the laying of a pipeline for an electrical utility is "incidental to electrical work" such work is not really electrical work because it does not require a knowledge of the intricacies of electrical circuitry). The relevant skill set relates to one's ability to keep the plant material alive. Members of Local 150 and Local 703 have these skills; members of the Roofers' Union do not (Tr. 475). This factor favors an award of the work to Local 150 and Local 703.

F. The Likelihood Of Job Loss Favors An Award To Local 150 and Local 703.

The Board will consider the potential for loss of jobs when making an award of the work.

Newark Typographical Union (Mid-Atlantic Newspapers), 220 NLRB 4, 7 (1975); see also Iron

Workers Local 40 (Unique Rigging), 317 NLRB 231, 233 (1995)("we find the potential adverse impact on the Employer's current employees favors an award of the work in dispute to those

employees"). The Roofers' Union wants Moore to subcontract the disputed work to a roofing contractor (Tr. 477). Eric Moore testified that Moore would be forced to lay off five or six employees if it were forced to give up the disputed work to a roofing contractor (Tr. 122-23). The likelihood of job loss militates against awarding the disputed work to the Roofers.

CONCLUSION

For all the above-stated reasons, Local 150 and Local 703 respectfully request the Board make an affirmative award of the disputed work to Local 150 and Local 703.

Dated: August 24, 2009 Respectfully submitted,

s/Bryan P. Diemer

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22

CERTIFICATE OF SERVICE

On August 24, 2009, Local 150 and Local 703 e-filed their Post-Hearing Brief with the Executive Secretary of the National Labor Relations Board. The undersigned further certifies that he caused a copy of the foregoing *Post-Hearing Brief of IUOE*, *Local 150 and IBT*, *Local 703* to be served upon:

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